No. 78-80

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BAYLOR UNIVERSITY MEDICAL CENTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet officially reported. The decision and order of the National Labor Relations Board (App. C, *infra*) are reported at 225 NLRB 771.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on February 14, 1978. On May 5, 1978, Mr. Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including July 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that a hospital violated Section 8(a)(1) of the National Labor Relations Act by issuing and maintaining a rule that prohibits employees during nonworking time from soliciting union support and distributing union literature in all areas of the hospital to which patients and visitors have access.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. (and Supp. V) 151 *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

STATEMENT

Baylor University Medical Center (the "Hospital") is a nonprofit health care institution.[1] In June 1975, the Hospital promulgated a rule limiting solicitation and distribution of literature, which, in relevant part, provided (App. C, *infra*, p. 39a):

> Solicitation of employees of Baylor University Medical Center by other employees or distribution of literature between employees is prohibited during work time and/or in work areas. The term "work areas" includes patient care floors, hallways, elevators or any other area, such as laboratories, surgery or treatment centers, where any type of service is being administered to or on behalf of patients and also includes any areas where persons visiting patients are likely to be disturbed. Service to our patients and their visitors includes not only primary and acute medical care, but food service and psychological support.

The effect of this rule was to bar employee solicitation and distribution of literature inside the Hospital, ex-

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[1] The National Labor Relations Act was amended, effective August 25, 1974, to extend its coverage to nonprofit health care institutions. 88 Stat. 395.

cept in a few small employee locker rooms (App. A, *infra*, pp. 2a-3a; Tr. 356-358, 646).[2]

Upon charges filed by the Union (a local and district council of the Laborers International Union), the Board concluded that the Hospital's no-solicitation/no-distribution rule violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), to the extent that it prohibited union solicitation and literature distribution by employees during nonworking time in areas of the Hospital to which patients and visitors have access, but which are not immediate patient care areas. In reaching this conclusion, the Board followed its decision in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150, where it had held that, while a hospital may lawfully ban employee solicitation and distribution, even during nonworking time, in immediate patient care areas—such as the patients' rooms, operating rooms, and places where patients receive treatment—a ban on that activity in other areas to which patients and visitors have access was invalid absent a showing by the hospital that such a ban was necessary to avoid a disruption of patient care (App. C, *infra*, pp. 30a-31a, 39a-41a). The Board ordered the Hospital to "[r]escind its rules restricting the areas in which employees may solicit

[2] While there are approximately 3,700 employees at the Hospital, the locker room areas available for solicitation and distribution of literature contain no more than 350 lockers (App. A, *infra*, p. 3a, n. 4; Tr. 646). "Tr." references are to the stenographic transcript of the testimony before the Administrative Law Judge.

on behalf of a labor organization during the employees' nonworking time insofar as it applies to other than immediate patient care areas, and prohibiting distribution of union literature during employees' nonworking time in nonworking areas of its operations or on its outside premises" (App. C, *infra*, pp. 31a, 63a).

The court of appeals denied enforcement of the Board's order (App. A, *infra*). Agreeing with the Tenth Circuit, which had declined to sustain the Board's *St. John's* decision,[3] the court held that the Board's policy as to the permissible scope of no-solicitation/no-distribution rules in health care institutions was "both contrary to congressional purpose and outside the Board's area of expertise * * *" (*id.* at 7a).

Accordingly, the court concluded that a ban on solicitation in the Hospital's corridors was justified not only because of the "likelihood that congestion and commotion would result from such solicitation," but also because "[w]herever in the hospital an emotionally vulnerable group of patients and their visitors may be present, we feel that unique considerations come into play which justify an otherwise overly broad no-solicitation rule" (App. A, *infra*, p. 15a). As to the cafeteria and vending machine areas, the court stated (*id.* at 16a):

> While we held that [the Hospital's] ban on soliciting in the hospital's corridors was justified

[3] *St. John's Hospital and School of Nursing, Inc.* v. *National Labor Relations Board*, 557 F. 2d 1368 (C.A. 10).

due to the "special circumstances" of a hospital environment, we hold that a similar proscription covering its cafeteria and vending area is justified because these areas are not materially "special" or different from other restaurants and shops.[4]

Judge Leventhal dissented from the court's decision insofar as it sustained the Hospital's ban against solicitation and distribution of literature in the cafeteria and vending areas. He would have upheld the Board's determination that "hospital cafeterias and vending machines" do not "present the same considerations as warranted the exception wrought for ordinary commercial restaurants" (App. A, *infra*, pp. 26a).

REASONS FOR GRANTING THE WRIT

In *Beth Israel Hospital* v. *National Labor Relations Board*, No. 77-152, decided June 22, 1978, this Court held that the Board's policy, as enunciated in *St. John's*, *supra*—"which requires that absent * * * a

[4] The Board has held that employee solicitation on the selling floor of a retail store or in the dining area of a public restaurant may be barred even during the employees' nonworking time, since such activity would tend to interfere with the primary purpose of the operation, which is to serve customers. See *Marriott Corp.*, 223 NLRB 978; *McDonald's of Palolo*, 205 NLRB 404; *Marshall Field & Co.*, 98 NLRB 88, enforced as modified, 200 F. 2d 375 (C.A. 7). In *St. John's*, *supra*, 22 NLRB at 1150-1151, n. 3, the Board concluded that a similar restriction was not warranted in a hospital eating facility, because the main function of the hospital is patient care and therapy and such functions are not performed in hospital eating facilities.

showing [of a substantial threat of harm to patients] solicitation and distribution be permitted in the hospital except in areas where patient care is likely to be disrupted"—was a permissible "construction of the Act's policies as applied to the health-care industry by the 1974 amendments" (slip op. 15). The Court further held that the Board had reasonably applied that policy in concluding the hospital there had violated the Act by barring employee solicitation and literature distribution in the hospital cafeteria, which was used primarily by employees but also by patients and visitors. In so holding, the Court rejected the argument that the Board was required to apply to hospital eating facilities the same rule that it applies to public restaurants (slip op. 21-22).

Insofar as the court below held that the Hospital was justified in proscribing employee solicitation in its cafeteria and vending machine areas because "these areas are not materially 'special' or different from other restaurants and shops" (*supra*, p. 6), its decision is directly contrary to this Court's decision in *Beth Israel*. Moreover, the holding of the court below that the Hospital was justified in proscribing such solicitation in other patient access areas was based, in part at least, on its rejection of the Board's *St. John's* policy(*supra*, p. 5), which was generally approved by this Court in *Beth Israel*.

In these circumstances, the judgment of the court below should be vacated and the case should be remanded for reconsideration in the light of this Court's

decision in *Beth Israel.* Since the Court in *Beth Israel,* while generally approving the Board's *St. John's* policy, emphasized that the Board should apply that policy in each hospital case with due regard for "the importance of the employer's interest in protecting patients from disturbance" (slip op. 20),[5] it is appropriate that this reconsideration be performed by the Board in the first instance. Cf. *Lutheran Hospital of Milwaukee, Inc.* v. *National Labor Relations Board,* No. 77-1289, order entered June 26, 1978, vacating a judgment enforcing a Board order similar to the one at issue here, and remanding the case to the court of appeals for reconsideration in the light of *Beth Israel.*[6]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to that

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[5] The Court explained (slip op. 20-21):

> While outside of the health care context, the availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry, * * * it may be that the importance of the employer's interest here demands use of a more finely calibrated scale. For example, the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same facility.

[6] The Board intends to request the Seventh Circuit to remand *Lutheran Hospital* to it so that it can perform the reconsideration task initially in that case also.

court with directions to remand it to the Board for reconsideration in the light of *Beth Israel Hospital* v. *National Labor Relations Board,* No. 77-152, decided June 22, 1978.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

JULY 1978.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1940

BAYLOR UNIVERSITY MEDICAL CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Argued October 27, 1977

Decided February 14, 1978

Robert W. Smith, with whom *Bowen L. Florsheim* was on the brief, for petitioner.

Paul J. Spielberg, Deputy Assistant General Counsel, National Labor Relations Board, with whom *John S. Irving*, General Counsel, *Carl L. Taylor*, Associate General Counsel, National Labor Relations Board, were on the brief, for respondent.

Before LEVENTHAL, MACKINNON and WILKEY, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* MACKINNON.

Opinion filed by *Circuit Judge* LEVENTHAL, concurring in part and dissenting in part.

MACKINNON, *Circuit Judge*: The Baylor University Medical Center ("Baylor") petitions for review of an order of the National Labor Relations Board ("Board") and the Board makes a cross-application for enforcement of its order. Our jurisdiction is conferred by section 10 (f) of the National Labor Relations Act, 29 U.S.C. § 160(e), (f). The Hearing Examiner conducted an extensive hearing on a complaint issued by the Board [1] charging, *inter alia*,[2] that Baylor's no-solicitation and no-distribution rule ("the no-solicitation rule")[3] was overly broad and an "unfair labor practice" in violation of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158 (a)(1). The gravamen of the Board's complaint was that this rule prohibited solicitation by employees during their non-working time and barred all forms

[1] The hearings in the consolidated cases No. 16-CA-5888, 16-CA-6050, and 16-CA-6206 were held on November 4, 5, 6, 1975.

[2] Baylor has complied with the NLRB order in every respect except for the portion relating to the no-solicitation and no-distribution rule.

[3] The no-distribution aspect of Baylor's rule will not be discussed per se. If solicitation can be banned, so *a fortiori* may distribution, raising as it does the additional problems of litter and general cluttering, *see* Stoddard-Quirk Mfg. Co., 138 NLRB 615, 620-621 (1962).

of solicitation and distribution in any areas of the hospital complex where services were administered to patients or where visitors might be disturbed, thereby effectively eliminating solicitation and distribution in all parts of the hospital buildings except for a small employees' locker room.[4] The full rule provided:

> Solicitation of patients or visitors by anyone on Baylor University Medical Center property is strictly prohibited. Solicitation of employees of Baylor University Medical Center by non-employees or the distribution of literature, pamphlets, or other material, by non-employees on Baylor University Medical Center property is prohibited.
>
> Solicitation of employees of Baylor University Medical Center by other employees or distribution of literature between employees is prohibited during work time and/or in work areas. The term "work areas" includes patient care floors, hallways, elevators or any other area such as laboratories, surgery or treatment centers, where any type of service is being administered to or on behalf of patients and also includes any area where persons visiting patients are likely to be disturbed. Service to our patients and their visitors includes not only primary and acute medical care, but, as you all know, food service and psychological support.
>
> Unauthorized sales and solicitation of orders for any type of product or service to anyone on

[4] This locker room contains no more than 350 lockers, whereas there are some 3,700 employees at Baylor.

Baylor University Center premises are prohibited.[5]

The Board's order, which fully adopted the recommended decision of the Hearing Examiner,[6] required

[5] This rule was "clarified" on June 21, 1975 by the posting of the following rule:

> Solicitation of patients or visitors by anyone for any purpose on Baylor University Medical Center property is strictly prohibited. Solicitation of employees of Baylor University Medical Center by non-employees or the distribution of literature, pamphlets or other material, by non-employees on Baylor University Medical Center property is prohibited.
>
> Unauthorized sales and solicitation of orders for any type of product or service to anyone on Medical Center Premises are prohibited.
>
> Solicitation of employees at Baylor University Medical Center by other employees or distribution of literature between employees is prohibited during work time or in work areas. The term "work area" includes patient care floors, hallways, elevators, conference rooms and places where employees confer on business, or any other area such as laboratories, surgery or treatment centers, where any type of service is being administered to or on behalf of patients and also includes any areas where persons visiting parents may be disturbed. Service to our patients and their visitors includes not only primary and acute medical care, but also food service and psychological support.

The Hearing Examiner had both rules before him in considering the case.

[6] The NLRB—Fanning, Penello and Walther members—said nothing in their decision except that "the Board has considered the record and the attached decision in light of the exceptions and briefs and has decided to affirm the rulings, finding and conclusions of the [Hearing Examiner] and to adopt his recommended order." J.A. at 27.

the hospital to cease and desist from enforcing this rule and to rescind any restriction on employees' solicitation other than in "immediate patient care areas." [7] In light of the general rule that solicitation cannot be proscribed during non-working time nor distribution during non-working time in non-working areas,[8] the Board—while it recognized the special circumstances presented by a hospital environment to the extent of conceding that Baylor could prohibit solicitation at all times within "immediate patient care areas" [9]—invalidated any ban on solicitation insofar as it applied to most of (1) the corridors, (2) to the cafeteria and (3) vending machine areas. The exclusion of these parts of the hospital from the permissible scope of the hospital's no-solicitation rule is the main point of contention between the parties.

We find that the record evidence compels the conclusion that the situation in Baylor involves unique

[7] J.A. 27-28.

[8] *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); D'Yourville Manor, Lowell, Mass. v. NLRB, 526 F.2d 3 (1st Cir. 1975).

[9] The Hearing Examiner adopted the language of the NLRB in its St. John's Hospital and School of Nursing, Inc., 222 NLRB No. 182, 91 LRRM 1333 (1976):

> We recognize that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function. In order to provide this atmosphere, hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation then [*sic*] are generally permitted.

J.A. at 21.

circumstances which justify a broad proscription on solicitation and distribution. In its resolution of this case the NLRB has not adequately discharged its responsibility to effectuate congressional policy,[10] which unquestionably has been concerned to avoid disruptions in hospitals. We adopt petitioner's contention that it is not an unfair labor practice to bar solicitation in Baylor's corridors. Furthermore, we feel that a strong line of authority arising in contexts other than that of health care facilities establishes the validity of the no-solicitation rule in the cafeteria and vending area.

The Hearing Examiner evidently felt compelled to limit Baylor's proscriptions on solicitation as he did because of the Board's recent decision in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB No. 182, 91 L.R.R.M. 1333 (1976), enforced in part and denied in part, 557 F.2d 1368 (10th Cir. 1977).[11] However, this decision subsequently was denied enforcement by the Tenth Circuit after the NLRB order in this case was issued, *St. John's Hospital and School of Nursing* v. *NLRB*, 557 F.2d 1368 (10th Cir. 1977). We agree with the Tenth Circuit that even were it possible—which it manifestly is not—to determine with any confidence and rationality which areas in a hospital are and which are not "immediately" involved in patient care,[12] the Board's overly restrictive position on the valid extent of no-solicitation rules in medical facilities must nevertheless be overturned as insensitive both to the unique conditions found in an acute general hospital and to the declared intent of Congress.

[10] *Cf.* NLRB v. Truck Drivers Local Union #449, 353 U.S. 81, 97 (1957); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

[11] The Hearing Examiner commented: "The Board's decision in the St. John's case is controlling here." J.A. at 22.

In reviewing an order by the NLRB, courts must accept its determinations if they are supported by "substantial evidence," [13] and give considerable deference to the Board's interpretation of the terms of the NLRA.[14] In this case, however, we find that the Board's decision is both contrary to congressional purpose and outside the Board's area of expertise,[15] and accordingly entitled to little of the deference

[12] *See, e.g.*, St. John's Hospital and School of Nursing v. NLRB, 557 F.2d 1368, 1372-73 (10th Cir. 1977) ("This distinction between strictly patient care areas and other patient access areas based on the relative conditions of the patients frequenting those areas find no support in the record. . . . Moreover, this distinction is difficult of application at best and indeed has been rejected by the Board in a similar context as 'specious.' ").

[13] NLRB v. Pipefitters, 429 U.S. 507 (1977); S. H. Camp & Co. v. NLRB, 160 F.2d 519 (6th Cir. 1947); 29 U.S.C. § 160 (e), (f) (1970).

[14] NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266, quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); Phelps Dodge Corp. v. NLRB, *supra* note 10.

[15] St. John's Hospital and School of Nursing v. NLRB, *supra* note 12, 557 F.2d at 1373 (". . . the Board's own perceptions of modern hospital care and the physical, mental, and emotional conditions of hospital patients—areas outside the Board's acknowledged field of expertise in labor/management relations.")

traditionally accorded to NLRB actions.[16] While we are not at liberty to deny enforcement to an order of the Board merely because we would have favored a different result,[17] we feel no hesitation in denying enforcement to the instant order.

I

The Corridors

The legislative history of the NLRA as it applies to voluntary, non-profit hospitals[18] reveals an unmistakable solicitude for the peaceful functioning of these institutions, even at some expense to employee's right to organize.[19] It was not until 1974 that such institutions—which employ some 55% of all hospital workers—were included within the NLRA, and in the course of amending the scope of the Act's coverage Congress clearly evinced its belief that these facilities presented special problems which mandated a different approach to the application of the NLRA than that taken in other fields.[20]

[16] *Cf.* NLRB v. Universal Camera Corp., 190 F.2d 429, 432 (2d Cir. 1951) (Frank, J., concurring); Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53-69.

[17] Brooks v. NLRB, 538 F.2d 260, 261 (9th Cir. 1976); NLRB v. Walton Mfg. Co., 369 U.S. 404, 405 (1962).

[18] The amendments to the NLRA which brought voluntary non-profit hospitals under the scope of the NLRA are contained in Public Law 93-360, 88 Stat. 395 (July 26, 1974).

[19] *See generally*, Vernon, *Labor Relations in the Health Care Field Under the 1974 Amendment to the NLRA: An Overview and Analysis*, 70 NW. U.L. REV. 202, 202 (1975).

> Many of the witnesses before the Committee, including both employee and employer witnesses, stressed the uniqueness of health care intitutions. *There was a recognized concern for the need to avoid disruption of patient care whenever possible.*
>
> It was this sensitivity to the need for continuity of patient care that led the Committee to adopt amendments with regard to notice requirements and other procedures related to potential strikes and picketing.

S. REP. No. 93-766, 93d Cong., 2d Sess. reprinted in 1974 *U.S. Code Cong. & Admin. News*, vol. 2, 3946, 3951 (emphasis added).

The Board suggested elsewhere that Congress was only concerned to prevent the disruptions that would be caused by actual strikes or picketing,[21] but we find no support for such a narrow reading of the congressional purpose.[22] On the other hand, the clear expressions of congressional concern for avoiding disruptions in the hospital environment that we do find in the legislative history encourages us to give special weight to the needs of patients in striking a balance

[20] The 1974 Amendments included a series of provisions seeking to discourage strikes and requiring advanced notice of them, July 26, 1974, Pub. L. 93-360, § 1(b)-(e), 88 Stat. 395, 396 (codified at 29 U.S.C. § 158(d), (g) (Supp. V 1975)).

[21] *See, e.g.*, St. John's Hospital and School of Nursing, *supra* note 12, 557 F.2d at 1374.

[22] *See generally, id.*

between preventing possible sources of disruptions in hospitals and protecting employees' right to organize.[23] Moreover, it seems clearly preferable in resolving any doubts as to how best to accommodate these conflicting interests to err on the side of protecting the patients—to whom irreparable injury might be done—rather than on that of a labor organization which can at worst suffer a brief, albeit unjustified delay.[24]

The interested parties should be particularly inclined to avoid possible sources of disruption in the case of a hospital as large and congested as Baylor. In total admissions, Baylor is the seventh largest hospital of the nation's 5,000 "acute care" private and charitable hospitals, fourth largest in surgical procedures, and second in bed capacity. It employs over 3,700 individuals to maintain its 1,125 beds and care for the 44,000 inpatients who are admitted there each year. There was testimony before the Hearing Examiner that some 15,000-20,000 persons entered

[23] No-solicitation rules have long been analyzed in terms of balancing the property rights of the employer and the organizational rights of the employees, *see, e.g.*, NLRB v. United Steelworkers of America, 357 U.S. 357 (1957); NLRB v. The Babcock and Wilcox Co., 351 U.S. 105 (1956). In this case, it is not the non-profit employer but rather its patients whose interests are in conflict with those of the employees.

[24] *See* St. John's Hospital and School of Nursing, *supra* note 12, 557 F.2d at 1371 ("A cautious judgment in such regard must note that error in such judgment may cause irreparable damage to patients, and thus to the public, while error in the other direction can be salvaged by the Board under proper use of its overall expertise in labor matters.")

the hospital each day[25] and that the passageways and corridors were "as crowded as the main streets of downtown Dallas."[26] It is remarkable that conditions at Baylor are not more chaotic than they are; certainly the imposition of any additional sources of potential disruption should only be required reluctantly and after a far more detailed analysis that the NLRB devoted to this particular case.[27]

Although respondents make much of Baylor's history of alleged anti-union bias,[28] there is no indication that its no-solicitation rule was in any way discriminatory or directed against efforts at unionization.[29]

[25] Petitioner's Brief at 10-11.

[26] Testimony of Mr. Howard M. Chase, Associate Executive Director of Baylor, J.A. at 161.

[27] *See* NLRB v. Beth Israel Hospital, 554 F.2d 477, 482 (1st Cir. 1977), *cert. granted*, 46 U.S.L.W. 3446, 3453 (U.S. January 17, 1978).

[28] Respondent's Brief at 4-6.

[29] Compare NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949); Bonwit Teller, Inc. v. NLRB, 197 F.2d 640 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953). Respondent points out that Baylor does allow solicitation for the United Fund and the American Cancer Society, as well as holding an occasional bake sale and benefit fair (a program designed to acquaint the employees with the benefits available to them). Respondent's Brief at 20-21; J.A. 173-181. The fact that Baylor permits such activities while banning other forms of solicitation does not, however, indicate illicit discrimination on the part of petitioner, as the solicitations which are permitted are manifestly non-disruptive and carefully controlled (the Cancer Society solicitation, for example, consisted only of a note included in each employee's paycheck) J.A. at 174, Testimony of Mr. Howard Chase. These solicitations are

The hospital takes a variety of other precautions against excess noise and crowding. For example, all employees are required to leave their work areas when they take their breaks from work,[30] and the hospital has maintained a ban on all forms of solicitation for some fifteen years [31]—long before there was any movement to unionize at Baylor.

The importance of preventing crowding and disruption in the hospital corridors cannot be seriously debated. Experienced witnesses testified of the extent to which congestion in the corridors impedes the operation of the medical staff and annoys patients and visitors.[32] Quick and unimpeded passage through the hallways was shown to be imperative to the efficient operation of the hospital and to the success of certain of its emergency services, such as the cardiac arrest unit.[33] The hallways serve not only as passageways

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part of a normal hospital operation and all lack the emotionally disturbing aspect of union solicitation in that they could not conceivably raise fears in patients or visitors that they might not receive the best possible health care.

[30] J.A. at 312, testimony of Linda Hiatt, Director of Nurses in Truett Hospital (one of Baylor's wings).

[31] J.A. at 155, Testimony of Mr. Howard Chase.

[32] J.A. at 169-170, Testimony of Mr. Jack Hays, Administrator of the Department of Physical Medicine, J.A. 293; Testimony of Linda Hiatt, J.A. at 313.

[33] J.A. at 182, Testimony of John Hicks, Administrator of Jonsson Hospital (one of Baylor's wings); J.A. 217, Testimony of William Rohloff.

for patients, visitors, doctors, and medicine,[34] but also as viewing rooms for the nursery [35] and storerooms for a variety of hospital equipment which must be available at a moment's notice.[36] There was also testimony that a great deal of the physical therapy undertaken at Baylor actually took place in the corridors,[37] and that for many departments the corridors served as the only available waiting room.[38] It is in large measure true, as petitioner insists,[39] that virtually every functioning part of an acute general hospital is involved in patient care,[40] and that at Baylor the corridors seem to serve as much as additional all-purpose rooms than merely as hallways.[41] On the record before us, it is patently unreasonable that the Board would require that solicitation be permitted in the corridors in view of the additional congestion and disruption which it would involve.

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[34] J.A. 193-194, Testimony of John Hicks; J.A. 159-160, Testimony of Howard Chase.

[35] J.A. 161, Testimony of Howard Chase.

[36] J.A. 310, Testimony of Linda Hiatt.

[37] J.A. 285-286, Testimony of Jack Hays.

[38] J.A. 265, Testimony of Dr. A. D. Sears, M.D. at Baylor.

[39] Petitioner's Brief at 10-18.

[40] *See generally*, NLRB v. Beth Israel Hospital, *supra* note 27, 554 F.2d at 482-83 n.6 ("We would add that a phrase like 'immediate patient-care areas' is far from self-defining given the complexity of a major metropolitan hospital. Would a waiting area by the nurse's desk on a floor where patients reside be a 'patient-care area?' Would the waiting room in the emergency ward?")

[41] J.A. 159-160, Testimony of Mr. Howard Chase.

Baylor could, as respondent suggests,[42] impose a general, "evenhanded" proscription on noise and loitering in the corridors rather than specifically banning solicitation. To suggest this alternative, however, would only exalt form over substance, as there are very few activities besides solicitation and distribution that could plausibly take place in hospital corridors and result in greater crowding and noise. Moreover, if the NLRB is willing to concede that such a broad rule might be justified by the special characteristics of a hospital (thereby preempting the question of the no-solicitation rule), it is hard to see why it insists that a no-solicitation rule also would not be justified. By rule Baylor prohibits solicitation because it is the most probable potential recurrent cause of disruption in the corridors. Furthermore, solicitation has a disruptive force quite apart from its contribution to noise level and overcrowding. There was evidence at the hearing that witnessing solicitation tends to undermine both patients' and visitors' confidence in the hospital.[43] Having to confront the worry that employees might reduce their standards of service as part of a labor dispute seems an unnecessary and undesirable additional source of anxiety for persons already hard-taxed emotionally.[44] And the thought

[42] Respondent's Brief at 20 n.15.

[43] J.A. 343, Testimony of Dr. A. D. Sears; J.A. at 209, Testimony of Dr. John Goodson, M.D. at Baylor.

[44] J.A. at 209, Testimony of Dr. John Goodson; J.A. at 255-256, Testimony of Joseph Gross, Director of Department of Pastoral Care at Baylor.

that matters affecting one's life and death are perceived in terms of wage increases and coffee breaks by those responsible for one's well-being fully justifies the very upsetting concern that patients and those close to them were shown to have about such activities.[45] It is not only the likelihood that congestion and commotion would result from such solicitation, but also the inherently disturbing effect of interjecting undertones of labor disputes into a situation where sick persons are totally dependent on the unflagging assistance of others that are major factors contributing to the disruptive effect of solicitation. Wherever in the hospital an emotionally vulnerable group of patients and their visitors may be present, we feel that unique considerations come into play which justify an otherwise overly broad no-solicitation rule.

> [I]t must be remembered that Respondents facility is not a manufacturing plant, it is a hospital. And it is in the nature of hospitals that certain of the working areas (hallways, elevators, stairs, patient's rooms, gift shops, etc.) are necessarily open to the use of patients and visitors. . . . Further, the hospital services ill individuals who, in their weakened condition may readily be upset if they overhear antiunion-prounion arguments . . . .

Guyan Valley Hospital, 198 NLRB 107, 111 (1972).

It is surprising that the NLRB changed its own established viewpoint on this matter so utterly, and

[45] J.A. 255, Testimony of Joseph Gross.

we find its now repudiated analysis more appropriate than its present position in the instant case.

II

The Cafeteria and Vending Areas

The cafeteria and vending areas of Baylor present a considerably different problem from that of the corridors. With regard to the Board's determination that solicitation must be allowed in the hospital's cafeteria and vending area—the other main point of disagreement between the parties—we also overturn the Board's ruling, but do so for a reason virtually the inverse of that which led us to deny enforcement of its invalidation of Baylor's no-solicitation rule as it applied to the corridors. While we held that Baylor's ban on soliciting in the hospital's corridors was justified due to the "special circumstances" of a hospital environment, we hold that a similar proscription covering its cafeteria and vending area is justified because these areas are not materially "special" or different from other restaurants and shops. We find the reasoning of the Tenth Circuit in *St. John's Hospital and School of Nursing* v. *NLRB*, *supra*, to be persuasive:

> As to "other patient access areas such as cafeterias, gift shops, and the like," we conclude that even if it is conceded these areas are not directly related to the Hospital's primary function of providing patient care, the Hospital nevertheless maintains the same commercial interests in these facilities as are held by the management of retail stores and restaurants located in other types of establishments. Since there is no question that the Hospital would be entitled to prohibit solicitation and distribution in all public access areas of its cafeteria and gift shop were they located anywhere outside the Hospital premises, *Marriott Corp.* (*Children's Inn*), 223 NLRB No. 141; *McDonald's Corp.*, 205 NLRB No. 78, we conclude that the Hospital does not lose that right simply because its public cafeteria and gift shop are part of a hospital complex rather than a shopping mall or drive-in restaurant.

557 F.2d at 1375.

Of course, there is not as much medical importance in maintaining the quietness or non-congestion of areas ordinarily as far removed from direct patient care as a public cafeteria or vending area,[46] but such areas in a hospital are not totally devoid of medical significance. Respondent is correct in pointing out that these places are likely to be emotionally disturbing even if solicitation is prohibited. Such arguments, despite the attention paid to them in the parties'

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[46] There is no significant issue of impeding passage through the cafeteria or vending area though this might vary depending upon its location within a hospital. Those patients who venture to these places cannot legitimately expect that the same artificially restorative atmosphere created for them in the rest of the hospital will be sustained, though they can expect that some consideration will be given to such needs and that such areas will have the same protection against commotion and disturbance as similar areas outside hospitals.

briefs,[47] are, however, irrelevant to our analysis. The same exigencies of good medical care that require allowing the prohibition of solicitation in hospital corridors may or may not justify the same proscription in a particular hospital cafeteria, but we hold that whether or not a restaurant or shop is in a hospital, its proprietor can bar solicitation on the premises.

The line of precedent in both court and NLRB decisions permitting blanket no-solicitation rules in restaurants and shops is long and unequivocal.[48] The essential rationale of these cases has been that as the success of such enterprises depends on attracting customers and thus on the cogeniality of the atmosphere in their premises,[49] it is reasonable to prohibit practices which tend to disturb or annoy.[50]

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[47] *See* Respondent's Brief at 22-24; Petitioner's Brief at 26-28.

[48] *See, e.g.*, Marshall Field & Co. v. NLRB, 200 F.2d 375 (7th Cir. 1952, amended 1953); NLRB v. May Department Store Co., 154 F.2d 533 (8th Cir.), *cert. denied*, 329 U.S. 725 (1946); Marriott Corporation, 223 NLRB No. 141, 92 LRRM 1028 (1976); McDonalds of Palolo, 205 NLRB 404, 84 LRRM 1316 (1973).

[49] *See* Marshall Field & Co. v. NLRB, *supra* note 48; May Department Store, *supra* note 48; Goldblatt Bros., Inc., 77 NLRB 1262, 1263-64 (1948).

[50] The cases in general assume that solicitation will be disruptive and approach no-solicitation rules from the perspective of whether or not employees' right to organize requires that the attendant disruption be tolerated, *see, e.g.*, Marshall Field & Co. v. NLRB, *supra* note 48.

Respondents suggest that the precedents involving commercial establishments are inapposite here because —unlike such institutions—hospitals do not risk losing their "customers" due to the irritation of solicitation.[51] While the principal business of retail establishments is attracting customers, a hospital's main concern—it is argued—is patient care, and its shops and cafeterias are no more than peripheral to its main operation. To the extent that this argument has any force whatsoever, it is wholly misplaced in this context. Whether or not patients and their visitors have choice about whether or not to use the hospital, they certainly have a choice about whether or not to use its cafeteria and vending machines. The cafeteria and vending area must still compete to attract the business of the hospital's patients. That a hospital is not "principally" in the restaurant business does not mean that it is not concerned that the restaurants which it does operate should be as attractive and profitable as possible. Public cafeterias in hospitals are operated as a convenience to its patients and their visitors and there is no justification for saddling them with restrictions, not applicable to cafeterias generally, that might from time to time compel them to operate at a loss. Assuming arguendo that a disturbance in the cafeteria would not significantly impede the hospital's health care, Baylor still has an independently valid interest in the profitable and orderly operation of its commercial food services which justifies barring solicitation in its restaurants.

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[51] Respondent's Brief at 22-24.

It does not appear from the record, but it may be the case, that Baylor operates its cafeteria and vending machines as a non-profit service, so that in this respect it differs somewhat in its objectives from those of the usual restauranteur. Nevertheless, in providing its services, it has much the same interest, albeit non-financial, that any owner does in making his facilities as pleasant as possible. Whether the motive is monetary enrichment or enriching the overall quality of the hospital environment, employers who operate establishments whose raison d'etre is their pleasantness are justified in imposing otherwise overbroad no-solicitation rules. It is not the goal of making money, but of running a facility whose primary goal is to be attractive that supports the special treatment accorded to restaurants in this regard.

III

Conclusion

We recognize that the instant appeal in some ways presents a harder case than did the facts of the *St. John's* decision by the Tenth Circuit, in that Baylor has significantly fewer "employees only facilities" than did St. John's Hospital and Nursing School.[52] Consequently, the extent to which the opportunity for union organization may be reduced by restricting solicitation to areas to which neither patients nor

[52] St. John's Hospital had an employees-only cafeteria in which it was estimated that 80% of the employees ate. There were also "numerous" other employees only areas such as lounges and locker rooms, 557 F.2d at 1375.

visitors have access may be greater than that sanctioned by the Tenth Circuit. We are, however, by no means confronted here with a situation in which there are no alternative channels through which the employees can communicate for purposes of organization. Where no such channels are available, an employer may be forced to permit solicitation where he otherwise could legitimately ban it.[53] Perhaps in different circumstances a hospital would be compelled to allow solicitation in its cafeteria or even in some of its corridors. As regards the situation at Baylor, however, petitioner has testified that its rule does not apply to any area outside the hospital buildings,[54] and it is apparent that the hospital's parking lots, lawns and gardens supply an excellent forum for solicitation. These areas are heavily used by employees, many of whom eat their meals and take their breaks there.[55] Thus, despite the paucity of indoor areas available for solicitation, it is by no means the case—particularly in light of the mild climate in Dallas, which makes the outside areas available virtually all year[56] —that the process of labor organizing would be cru-

[53] *See, e.g.*, Republic Aviation Corp. v. NLRB, *supra* note 8, 324 U.S. at 799; NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948).

[54] J.A. at 129-130, Testimony of Howard Chase. Non-employee solicitors were barred from all Baylor property under its rule.

[55] J.A. at 324-325, Testimony of Mr. Howard Chase.

[56] J.A. at 324, Testimony of Mr. Howard Chase.

cially disadvantaged by limiting solicitation, for the most part, to the out-of-doors.

The mere fact that there are alternative channels available would not, of course, alone justify an otherwise illegal no-solicitation order, but at least when such channels are open, an employer need not modify an otherwise justifiable no-solicitation rule.[57] The instant case may be somewhat harder than *St. John's*, but not so much so that the principle developed there must be abandoned because the employees are "uniquely handicapped in the matter of self-organization and concerted activity."[58] We do not find that the minor added inconvenience of having to solicit in outdoor areas outweighs our congressionally directed solicitude to avoid disruptions in hospitals.

In conclusion, we note that before its *St. John's* ruling, the NLRB and the courts both agreed that the special circumstances presented by health care facilities demanded that they be treated differently from

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[57] The Board insists that the availability of alternative avenues of employee communication are irrelevant until the hospital has rebutted the presumptive illegality of its no-solicitation rule, *see* Respondent's Brief at 24-28; NLRB v. Magnavox Co. of Tennessee, 415 U.S. 322, 326-27 (1974). This is a correct reading of the law, but as we find that "special circumstances" of the hospital environment have more than rebutted any such presumption, the Board's argument is without force in this particular case.

[58] Marshall Field & Co. v. NLRB, *supra* note 48, 200 F.2d at 381.

other industries under the NLRA.[59] An agency is, of course, free to alter its policies,[60] but the remarkably meager evidence available to the NLRB in the *St. John's* decision [61] suggests that in reversing its earlier policies the Board in this instance may have had inadequate exposure to the special considerations involved in assessing the proper scope of labor solicitation in health facilities. It is true that one recent case has upheld the rule announced in *St. John's* NLRB order, *NLRB* v. *Beth Israel Hospital*, 554 F.2d 477 (1st Cir. 1977) *cert. granted*, 46 U.S.L.W. 3446, 3453 (U.S. January 17, 1978), but even there the court was highly critical of applying this rule in broad terms [62] and insisted on a case by case balancing test weighing the particular circumstances in individual hospitals as they came before the Board. The First Circuit emphasized that hospitals present "unique

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[59] *See, e.g.*, Summit Nursing and Convalescent Home, 472 F.2d 1380 (6th Cir. 1973); Shorewood Manor Nursing Home, 217 N.L.R.B. No. 35, 89 L.R.R.M. 1037 (1975) (Penello, dissenting); Guyan Valley Hospital, 198 NLRB 107 (1972).

[60] NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 347-52 (1953).

[61] The St. John's case was submitted to the NLRB on six stipulations and no evidence was presented on the question of how distribution or solicitation would affect patients. Petitioner's Brief at 20.

[62] Petitioner aptly suggests that the First Circuit in relying on the NLRB ruling in St. John's Hospital could not have realized how scant the evidence on which that decision was based had been. Petitioner's Supplemental Reply Brief at 6.

considerations that do not apply in industrial settings" and that "the Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized." [63] In this case we feel that petitioner has adequately demonstrated that the well-being of patients and visitors and the operation of the hospital would be jeopardized by allowing solicitation in the corridors and wherever else patients or visitors have access.

There is no need for further examination of the conditions at Baylor. Accordingly, we do not exercise our option to remand to the NLRB. Instead, we grant enforcement of its order only insofar as it covers those provisions unrelated to petitioner's no-solicitation rule and deny enforcement as to the remainder.

So ordered.

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[63] 554 F.2d at 481.

LEVENTHAL, *Circuit Judge, concurring in part and dissenting in part*: The majority denies enforcement of a Board order invalidating the hospital's ban against solicitation and distribution of literature in the hospital corridors, cafeteria and vending areas. I concur in the majority opinion insofar as it applies to the hospital corridors. I cannot agree, however, that a rule barring these activities in the cafeteria and vending areas has been shown to be equally defensible. Since the Supreme Court will soon address this issue in another case,[1] I will confine myself to a few brief remarks.

The general principle, established in *Republic Aviation* [2] and other cases posits that rules prohibiting union solicitation on the employer's property during nonworking time are presumptively unreasonable and discriminatory. That rule is subject to an exception relied on by the majority, which develops the legality of no-solicitation rules in ordinary restaurants and shops.[3] The rationale of these cases, as the majority notes, is the crucial importance of a congenial atmosphere to the success of the business. That is the justification of the exception.

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[1] NLRB v. Beth Israel Hospital, No. 76-1318 (1st Cir. April 29, 1977, *cert. granted* sub nom. Beth Israel Hospital v. NLRB, 46 U.S.L.W. 3446, 3453 (S.Ct. Jan. 17, 1978). In *Beth Israel*, the First Circuit granted enforcement to that part of a Board order requiring the hospital to rescind its rule against distribution and solicitation in the hospital cafeteria and coffee shop.

[2] Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

[3] See majority opinion at 14-17 *supra*.

The case at bar—hospital cafeterias and vending machines—does not present the same considerations as warranted the exception wrought for ordinary commercial restaurants. Their role and context is not the main business of a hospital but an ancillary convenience—making refreshment available to staff and visitors (and to patients free to leave their rooms). The hospital cafeteria and vending areas are not in direct competition with ordinary restaurants for this trade. The time and place utility of a hospital cafeteria gives it advantages for custom not bestowed by the food and ambience.

To be sure, the hospital has a legitimate interest in a congenial atmosphere in its cafeteria—but it is not the kind of live-or-die imperative that must be given recognition even though it undercuts the rights of employees protected by the general *Republic* principle.

The distinction I have delineated is reinforced, I think, when it is viewed in conjunction with the hospital's ban on solicitation in direct patient care areas and closely related locations, including corridors that are likely to be used for or involved in patient care, the central purpose of the hospital. I join the majority in upholding this aspect of the hospital's rule. But if, out of necessity, the law permits curtailment of employee rights (union activities) in certain sensitive areas, is there not a fairly correlative expectation of a certain receptivity to those rights and activities in other hospital locations?

In my view the statute does not fairly contemplate that a hospital can confine its employees to the closets,

and deny them protection in the places most natural for talk that is not patient-related, by leaning on the exception wrought for commercial enterprises to ensure survival.

The Board acted reasonably and with sufficient basis in the record when it concluded that solicitation in such locations as cafeterias and vending machines would not significantly undercut the therapeutic functioning of the hospital. It is only in the most general and non-critical sense that "patient care" is rendered in these areas. They are basically retreats, where patients, staff, and visitors may withdraw from immediate contact with patient care areas. They are natural places for employees to talk about matters of mutual concern such as unions.

I respectfully dissent from that portion of the majority opinion which holds that the Board was not authorized to protect such talk in these cafeteria and vending areas.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 76-1940

BAYLOR UNIVERSITY MEDICAL CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

BEFORE: Leventhal,* MacKinnon and Wilkey, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard upon a petition filed by Baylor University Medical Center, to review that portion of an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, insofar as said order invalidated the no-solicitation/no-distribution rule of the Medical Center, and upon a cross-application filed by the National Labor Relations Board to enforce such portion of said order. The Court heard oral argument of respective counsel on October 27, 1977, and has considered the briefs and transcript of record filed in this cause. On February 14, 1978, the Court, being fully advised in the pre-

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* For the reasons stated in his opinion concurring in part and dissenting in part, Circuit Judge Leventhal does not approve this judgment except as to form.

mises, issued its decision denying enforcement of the relevant portion of the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the District of Columbia Circuit that the petition to review is hereby granted, that the relevant portion of the order of the National Labor Relations Board being reviewed is set aside, and that the cross-application of the National Labor Relations Board to enforce its order insofar as this order invalidated Baylor University Medical Center's no-solicitation/no-distribution rule be, and it is hereby, denied.

/s/ Harold Leventhal
HAROLD LEVENTHAL
Circuit Judge
United States Court of Appeals for the District of Columbia

/s/ George E. MacKinnon
GEORGE E. MACKINNON
Circuit Judge
United States Court of Appeals for the District of Columbia

/s/ Malcolm R. Wilkey
MALCOLM R. WILKEY
United States Court of Appeals for the District of Columbia

[Judgment Entered February 14, 1978; Filed May 18, 1978]

APPENDIX C

FPW
D—1499
Dallas, Tex.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 16-CA-5888
16-CA-6050
16-CA-6206

July 29, 1976

BAYLOR UNIVERSITY MEDICAL CENTER

and

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 648; AND NORTH CENTRAL TEXAS LABORERS DISTRICT COUNCIL, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

DECISION AND ORDER

On April 29, 1976, Administrative Law Judge John P. von Rohr issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the Charging Party filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs

and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the respondent, Baylor University Medical Center, Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Administrative Law Judge's recommended Order.

Dated, Washington, D.C.

John H. Fanning, Member

John A. Penello, Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

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[1] Respondent's motion for oral argument is hereby denied. In our judgment the record, including exhibits and briefs, adequately presents the issues and the positions of the parties.

JD-270-76
Dallas, TX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case Nos. 16-CA-5888
16-CA-6050
16-CA-6206

BAYLOR UNIVERSITY MEDICAL CENTER

and

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 648, AFL-CIO; AND NORTH CENTRAL TEXAS LABORERS' DISTRICT COUNCIL, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

Ronald K. Hooks and Steven Carsey, Esqs.,
for the General Counsel.

Robert W. Smith and Robert B. Cook, Jr., Esqs.,
for the Respondent.

Marvin Menaker, Esq.,
for the Charging Party.

DECISION

Statement of the Case

JOHN P. von ROHR, Administrative Law Judge: Upon charges, duly filed, the General Counsel of the National Labor Relations Board, by the Regional Director for the Sixteenth Region (Fort Worth, Texas), issued consolidated complaints against Baylor University Medical Center, herein called the Respondent, alleging that it had engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act.[1] The Respondent filed answers denying the allegation of unlawful conduct alleged in the complaints.

Pursuant to notice, a hearing was held before the undersigned in Dallas, Texas, on June 23, 1975, and November 4, 5 and 6, 1975. Briefs were received from the General Counsel, the Respondent and the Charging Party on December 15, 1975, and they have been carefully considered.

Upon the entire record in this case, and from my observation of the witnesses, I hereby make the following:

Findings of Fact

I. The Business of the Respondent

Baylor University Medical Center is a Texas corporation, with its principal office and place of business located in Dallas, Texas, where it maintains and operates a non-profit hospital. During the 12 months

[1] The complaint in Case No. 16-CA-5888 issued on April 18, 1975, based upon a charge filed on January 31, 1975. The complaint in Case No. 16-CA-6050 issued on July 31, 1975, based upon a charge filed on May 6, 1975. The complaint in Case No. 16-CA-6206 issued on October 20, 1975, based upon a charge filed on September 4, 1975.

preceding the hearing herein, Respondent purchased goods or services valued in excess of $50,000 from points and places outside of the State of Texas. The parties concede, and I find, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Laborers International Union of North America, Local Union No. 648, AFL-CIO; and North Central Texas Laborers' District Council, Laborers International Union of North America, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The No-Solicitation, No-Distribution Rule; Respondent's Enforcement Thereof*

Preliminarily, and as the only background in this proceeding, it is noted that the Charging Union commenced an organizing campaign among Respondent's employees in about September or October 1974. At this time Respondent maintained a no-solicitation, no-distribution rule which, as set forth in an employee handbook entitled "Working at Baylor" and under the Section entitled "Immediate Discharge" stated as follows:

> An employee may be discharged without notice when his presence constitutes a significant problem to the Medical Center or when he engages willfully in conduct which is detrimental to the welfare of the Medical Center. The following are examples of causes for immediate discharge:
>
> 7. Engaging in any type of sales or solicitation activity, any distribution of literature, or other commercial activity among patients, visitors, employees or others on or adjacent to the hospital property without written adminstration approval.

Thelma Goolsby, a clerical, was one of Respondent's employees to become active in the organizational campaign. It is undisputed that on December 2, 1974, she was summoned to the office of Gary Robinson, the Administrator of Truett Hospital.[2] Robinson testified that he spoke to her at this time because earlier that day he had received a report that she had "handed an envelope with union cards" to another employee to distribute and that this had occurred while both "allegedly were on duty." Concerning this conversation, Robinson related that he asked Goolsby if she had been soliciting in any way, to which she replied "Well, it wasn't on company time." He then showed her the employee handbook and referred her to the rule cited above. Quoting Robinson, he testified further "I just gave her some examples and told her that if she, indeed, was soliciting that it could be grounds for termination in the future."[3]

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[2] Truett Hospital is one of five hospitals which constitute the Baylor University Medical Center.

[3] Goolsby testified that she distributed union leaflets and union authorization cards during this period, but that this was done either in the cafeteria or in the area of the parking lot during her nonworking time.

Approximately 2 weeks later, Goolsby had a conversation with James Reedy, an Assistant Unit Manager at Truett. Reedy asked if he had correctly observed her and another employee handing out literature on a sidewalk outside the hospital. When Goolsby confirmed that she had, Reedy asked why she would engage in this activity after Robinson had already called her down to the office and spoken to her about Respondent's no-solicitation rule. Goolsby responded that she had handbilled on her own time, and further, that the Federal Government gave her the right to unionize if she so desired. According to Goolsby, Reedy thereupon "asked me why would I give them something to put their finger down on me after I had been told of the solicitation rule, and that whoever told me about the Federal Government rule that they should go back and read it again."[4]

That Respondent intended to enforce the aforenoted no-solicitation, no-distribution rule is further reflected in a letter to the Truett employees dated December 23, 1974. I set forth this letter in its entirety not only because it reflects Respondent's policy with regard to the rule, but also because its antiunion tone is relevant background to the termination of Barbara Moseley, whose discharge is also at issue herein. The letter stated as follows:

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[4] The above conversation is set forth in accordance with the credited testimony of Goolsby. Insofar as Reedy's version of this conversation differs with that of Goolsby, from my observation of the witnesses, I do not credit it.

TO: ALL PATIENT SERVICE EMPLOYEES, TRUETT HOSPITAL

As you probably know, there is an effort to unionize some of our employees. Several employees have asked our advice on this matter.

We believe that a union would not be in the best interests of employees or of the institution.

—Patient care requires teamwork among all employee groups. Union tactics could interrupt patient care. Their real leaders are outsiders and do not understand the loyalty we have to each other and to patients.

—Each employee's right to deal directly with his employer on his individual needs and interests is a precious thing. With unions, the decisions would be made through lawyers and negotiators, which would be unsatisfactory both to the employee and to the Medical Center.

—Baylor regularly reviews wages and benefits and has increased them every year for many years. In this, it has been a leader among hospitals. In 1974, wages were increased twice and another holiday was added.

The union has stressed the legal rights of employees to join unions under new Federal law. The law also protects the rights of individual employees who do not wish to join.

Since we are convinced of the negative impact of unions on our employees and patients, we will exercise all of the rights an employer has under

the Federal law. For several years, the Medical Center has had a policy against solicitation or the distribution of non-authorized literature on hospital premises by anyone. The new Federal law does not change this policy. Contacting employees at work is a violation of it and we hope that employees will not be misled into such violations.

You are encouraged to contact your supervisor or me directly if anyone pressures you to sign anything or interfers with your right not to join. You can count on our keeping this in confidence.

It is undisputed that on June 21, 1975, Respondent promulgated the following additional no-solicitation, no-distribution rule.[5]

Solicitation of patients or visitors by anyone on Baylor University Medical Center property is strictly prohibited. Solicitation of employees of Baylor University Medical Center by non-employees or the distribution of literature, pamphlets or other material by non-employees on Baylor University Medical Center property is prohibited.

Unauthorized sales and solicitation of orders for any type of product or service to anyone on Medical Center premises are prohibited.

[5] The allegation that Respondent "promulgated" this rule is admitted in Respondent's answer. While the record is not clear on the subject, presumably the rule was reduced to writing and posted and/or distributed to its employees. There is no showing that the original rule set forth in the employee handbook was ever revoked.

Solicitation of employees of Baylor University Medical Center by other employees or distribution of literature between employees is prohibited during work time and/or in work areas. The term "work areas" includes patient care floors, hallways, elevators or any other area, such as laboratories, surgery or treatment centers, where any type of service is being administered to or on behalf of patients and also includes any areas where persons visiting patients are likely to be disturbed. Service to our patients and their visitors includes not only primary and acute medical care, but food service and psychological support.

B. *Conclusions as to the Rule and Its Enforcement*

It is well settled that the rule initially set forth in the employee handbook which prohibits solicitation and distribution of literature on the premises by anyone is invalid on its face. Although citation of authority is hardly required, see, for example, *Summit Nursing and Convalescent Home, et al*, 196 NLRB 279, and authorities cited therein.

Insofar as the rule promulgated by Respondent on June 21, 1975, is concerned, this rule is substantially the same as that found to be unlawful in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB No. 182. Respondent in this case raises the same contention raised by the employer in the *St. John's* case, namely, that the nature of a hospital is such that they are justified in maintaining broad no-solicitation, no-distribution rules. Recognizing that

solicitation in certain areas in the hospital may be justified, but finding that the rule in question was unlawful in that it prohibited all solicitation and distribution in all areas to which patients and visitors have access, the Board stated as follows:

> We recognize that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function. In order to provide this atmosphere, hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation then are generally permitted. For example, a hospital may be warranted in prohibiting solicitation even on nonworking time in strictly patient care areas, such as the patient's rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas. Solicitation at any time in those areas might be unsettling to the patients—particularly those who are seriously ill and thus need quiet and peace of mind. Consequently, banning solicitation on nonworking time in such areas as described above would seem justified in hospitals and to the extent that Respondent's rule prohibits such activity in those areas is valid.
>
> Respondent's broad restrictions, however, are not justified by these considerations insofar as they apply to other areas. As to the restriction in visitor access areas other than those involved in patient care, the possibility of any disruption in patient care resulting from solicitation or distribution of literature is remote. As to the restrictions in patient access areas such as cafeterias, lounges, and the like, we do not perceive

> how patients would be affected adversely by such activities. On balance, the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit union representation. [Footnote omitted]

The Board's Decision in the *St. John's* case is controlling here.[6] Accordingly, I find that by promulgating and maintaining an unlawful no-solicitation, no-distribution rule to the extent that it prohibits all solicitation and distribution on Respondent's property and in hospital areas other than immediate patient care areas, Respondent violated Section 8(a)(1) of the Act.

C. *Surveillance*

A union meeting was held at the Dr. Martin Luther King Center, Dallas, Texas, on or about August 27, 1975. The meeting was conducted by a paid organizer of the Charging Union, with employees of Respondent in attendance.

It is undisputed that this meeting was also attended by Robert C. Felder, the Administrator of the Pulmonary Services Department and a supervisor within the meaning of the Act. Employee Thelma Goolsby testified that near the outset of the meeting she saw Felder enter the room with another man and pick up some union literature which was displayed on a table near the entrance. Felder and the other

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[6] See also the recently decided *Baptist Hospital, Inc.*, case, 223 NLRB No. 34. Both of these cases were decided subsequent to the hearing and filing of briefs herein.

individual then took a seat near the back. Felder remained for 15-30 minutes and then departed.

Felder explained his presence at the meeting by testifying that as he was driving home around 4:30 p.m., he heard an announcement over the radio that there would be "a big hospital workers meeting at Martin Luther King Center at 7:00 p.m." He said that the reason he attended the meeting was because "it was advertised as a Health Care Workers' meeting and I am a Health Care Worker." He further asserted that he was not aware that the meeting was in fact a union meeting until this was made clear from the remarks of the organizer when she addressed the meeting and that he left the meeting at this point.

Felder conceded that for some time prior to the meeting he was aware of the organizational campaign among Respondent's employees and that he had also seen various union handbills and literature, including union authorization cards, which were distributed to the employees. He also conceded that at the meeting he recognized Goolsby and two other Respondent employees in attendance.

I cannot conceive that Felder was so naive as to not suspect that the meeting concerning which he heard the announcement was anything other than a union meeting. I do not credit his testimony to the contrary. In any event, assuming *arguendo* that he did not know the purpose of the meeting, it hardly seems that it should take him 15-20 minutes to find out. From my observation of the witnesses, and in consideration of the entire circumstances involved, I am persuaded

that Felder was primarily motivated to attend the meeting for reasons proscribed by the Act, namely, to engage in surveillance. I find that by such conduct, Respondent violated Section 8(a)(1) of the Act.

D. *The Discharge of Barbara Moseley*

Barbara Moseley was hired by Respondent on February 1 or 2, 1975, as a special accounts collection assistant. Her principal duties involved the reviewing and posting of discounts for physicians, clergymen and Baylor Hospital employees and to review accounts with bad debt charges. Respondent's rules provide that all employees are hired on a probationary basis for a period of 3 months. Moseley was terminated at the end of her probationary period; i.e., on May 1, 1975.[7]

After learning about the organizational activity in April, Moseley presented herself to representatives of the Union and let it be known that she wished to become an organizer. The Union promptly accepted her services but advised her that, in accordance with its policy, Respondent should be apprised of this role. Accordingly, Moseley signed a form letter provided by the Union. This letter, bearing the date indicated, was sent to Respondent by the Union and stated as follows:

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[7] All dates hereinafter refer to the year 1975.

04/11/75

GENTLEMEN:

We the undersigned are members of the Laborers' International union of North America, AFL-CIO, and are actively engaged in building a union at BAYLOR UNIVERSITY MEDICAL CENTER. This letter is to inform you that we intend to do our job, as we have in the past, with no interference with our duties. However, we are cognizant of our rights under federal law, which grants us the right to be members of the union and work in its behalf without threats of discharge or intimidation from management.

It should not be presumed from out activities on the behalf of the union that we have animosity toward our supervision or management. It is our opinion that our rights as employees are best served when we bargain collectively with our employer.

Very Truly Yours,
Barbara Moseley

EW
cc: Mr. Edwin Youngblood,
Regional Director National Labor Relations Board

The above letter was received by Respondent on Monday, April 14. In mid-afternoon of the same date, April 14, Moseley was summoned to the personnel office. She was there greeted by Allan Sutton, the Director of Business Services; Elvis Bates, the Director of Personnel Services; and David Reynolds, Moseley's supervisor, who is the Manager of Discharged

Patients Accounts. Bates began by handing Moseley the following letter and asking her to read it:

Dear Mrs. Moseley:

This is to confirm that Baylor University Medical Center has a policy concerning distribution of literature and solicitation of employees. You are advised that solicitation of employees and/or distribution of literature to them by you during your work time and their work time, or in the Business Office, is prohibited.

We have confirmation that you have violated this rule. Be advised that any further violation of it will be grounds for immediate termination in accordance with Baylor policies. If you have any questions about the meaning of this warning, please discuss them with me.

Cordially yours,
[Elvis E. Bates, Director
Personnel Services]

Upon reading the letter, Moseley inquired as to the nature of the solicitation which prompted the charge that she had engaged in any such activity. Bates replied that he was not obliged to reveal the source. When Moseley repeated the question and asked what type of literature she was supposed to have distributed, Bates answered, "Well, you know." Moseley rejoined, simply, that she was aware of Respondent's no-solicitation rule. Bates thereupon stated, "Well, we want you to be the best employee that you can." At this point, Reynolds spoke up to say, "Well, I don't

see any problem with her work."[8] Moseley finally asked if they had not been informed by the Union of her intent to work on its behalf. Bates stated "Oh, you signed the letter" and then asked "When did you sign it?" Moseley replied that she had done so on the preceding Friday. Bates thereupon ended the discussion with the statement, "Well, I don't feel we have anything further to talk about." However, as Moseley was leaving the office, Reynolds asked if she would give him the letter which she had received from Bates. Moseley declined, stating that she wished to retain it.[9]

For the apparent purpose of explaining the reason for calling in Moseley on this particular date, Respondent called Karen Hopkins to testify on its behalf. Hopkins, an employee, holds the position of accounts counsellor. On direct examination, Hopkins testified that around 1 p.m. on April 14, she went to Moseley's office to see employees Lee Cooksie and Lois Ford, who also worked there, about business. At that time, she said, Moseley stopped her, asked if she was interested in the Union, and handed her three pieces of union literature. Hopkins' testimony on cross-examination was more enlightening. In the first place, on cross she could not give any valid reason for pinpointing the date of this incident as being April 14. Significantly, in her pre-trial affidavit, given 4 months earlier, she

[8] Credited testimony of Moseley. Moseley impressed me as being a truthful witness.

[9] Although Reynolds denied that he asked for the letter, I do not believe that Moseley fabricated the above testimony and I credit it.

stated, "I don't remember the date when this occurred." Furthermore, in the affidavit she also stated, "No one put me up to seeing if Moseley was working for the Union. I just did it on my own." In the latter connection, Hopkins conceded that upon entering Moseley's office it was she, Hopkins, who brought up the subject of the Union. She said she did this by asking Cooksie what she thought about the Union. It was at this point, she then testified, that Moseley spoke up and asked her if she was interested in knowing about the Union; and at this point Moseley handed her the literature. Furthermore, it is interesting to note, as Hopkins conceded, that upon receiving the literature she promptly went to the office of Ray Gwinn, the Accounts Manager who is on the same supervisory level as Reynolds, and gave him the literature. Hopkins conceded that she was on her working time when she brought up the subject of the Union and that she was aware that this was against the rules. She also conceded that on other occasions she would turn over union literature to Gwinn and that she and Gwinn would discuss the Union during working hours.

If Respondent sought to show through the testimony of Hopkins that Moseley was confronted and warned by three Respondent officials on April 14 because she allegedly solicited Hopkins on that day, it failed its purpose. Not only was Hopkins' testimony inconsistent with her pre-trial affidavit, but she was also less than forthright in giving her testimony on direct examination. In short, I do not credit her testi-

mony that on April 14, Moseley broached her about the Union. To the contrary, I credit the testimony of Moseley that she did not pass out any literature prior to April 14. Moreover, it is not without significance that two of the principals on that day, namely Bates and Sutton, were not called as witnesses by Respondent to give an explanation for *their* calling in Moseley on April 14. As for Reynolds, who was called, he indicated only that it was Bates who decided to call Moseley in. As to the purported reason for Bates taking this action, Reynolds testified merely that, "Mr. Bates did indicate that he had received notification that Ms. Moseley had violated Baylor's solicitation rule and he wanted to make sure she understood this rule and this policy."

As previously noted, Respondent received a letter notifying it of Moseley's affiliation with the organizing campaign on April 14. Although the parties did not stipulate as to the time of day the letter was received, it is noteworthy that Moseley was not called to the office until mid-afternoon of that date. Upon the entire record in this, and in the light of the discussion set forth above, including the absence of any testimony or credible explanation by the Respondent witnesses involved for taking this action, I am persuaded and find that this action was prompted entirely by Respondent's receipt of the letter in question on that date.[10]

[10] I do not construe the testimony alluded to by Respondent at TR 126 and 319 as indicative that Respondent did not, in fact, receive this letter prior to calling Moseley to the office.

Continuing with the chronology of events, it was on the next day, April 15, that Reynolds prepared a highly critical report concerning Moseley's work performance. More will be said about this in the succeeding section of this Decision. This report, which Reynolds said he retained in his files, was not shown or discussed with Moseley. It reads as follows:

> On Monday, March 17, 1975, the weekly data processing run of DA Accounts (Debit Balance) was received as usual by me, and I noticed an unusual large number of accounts on the run. There were approximately 80 accounts rather than the usual four or five.
>
> Upon scrutinizing the accompanying statements, I discovered that about 75 of the debit balances had been created by erroneous postings by Mrs. Moseley on March 15, 1975. I had a conference with Mrs. Moseley on March 17, 1975, at which time I carefully reviewed her errors with her, and instructed her on the proper corrective turn-around which I wanted accomplished during the week.
>
> However, on Monday, March 24, 1975, upon receiving the weekly data processing run of DA Accounts (Debit Balances), I noticed that none of the errors had been corrected by Mrs. Moseley, as I had thoroughly instructed her the previous Monday, I again had a conference with Mrs. Moseley, this time on March 24, 1975, at which time I questioned her as to why she had not accomplished the turn-around as I had instructed her. She had no answer—or rather, said that she didn't know why.

Therefore, I again carefully instructed her on how to properly correct the errors she had made on March 15, 1975. I even filled out a sample Accounts Receivable Memo form for her to use as a guideline in her corrections.

Sure enough, on Monday, March 31, 1975, a review by me of the weekly data processing run of DA Accounts revealed that only half of the errors had been corrected. I again had a conference with Mrs. Moseley, at which time I expressed my dissatisfaction and disappointment over her failure to perform the turn-around as I had twice explicitly instructed her to do so. She again had no answer as to why only part of the accounts had been corrected. Again, I gave her instructions on how to properly correct the errors she had made on March 15, 1975.

On Monday, April 7, 1975, a review by me of the weekly data processing run of DA Accounts revealed that all but about 10 of the errors had been corrected. I repeated the instruction session once again with Mrs. Moseley, who again had no explanation as to why some of the accounts had not been turned around by her.

On Monday, April 14, 1975, there still appeared one account which was handled erroneously by Mrs. Moseley on March 15, 1975, which still had not been corrected as she had been instructed by me, not once, but on three different occasions.

For Mrs. Moseley to take an entire month to accomplish a corrective turn-around which could and should have been done in only a matter of minutes, indicates to me a lack of aptitude and an unwilling attitude to perform her assigned

duties. The foregoing is a classic example of substandard work performance which would indicate that Mrs. Moseley does not have the potential for being a good employee on a long-term basis.

[David D. Reynolds]

Moseley was terminated on May 1, 1975. Called before Sutton and Reynolds, Sutton at this time handed her the following letter.

Dear Mrs. Moseley:

You will recall that when you were selected for Baylor employment as a Collection Assistant in the Discharged Patient Accounts Office, you were advised that for all employees the first three months of employment is a probation period.

The probation policy is set forth also in Baylor's general information handbook, *Working at Baylor.*

Your overall duty performance in your position has been less than satisfactory over this probationary period for reasons that have been brought to your attention.

This is notice that your employment with Baylor University Medical Center will be terminated at the end of your duty schedule on May 1, 1975.

Sincerely,
[Allen D. Sutton]

A rather lengthy conversation ensued at this time in which Moseley essentially protested the basis for

her discharge. When she finally asked if the decision to discharge her was influenced by her union activities, Sutton replied that he was not at liberty to discuss the matter and that he considered the discussion closed.

E. *Respondent's Defense; Conclusions as to Moseley*

As indicated in Sutton's May 1 letter to Moseley, it is Respondent's contention that Moseley was terminated at the end of the 90-day probationary period because her work performance had been less than satisfactory. Upon consideration of all the facts and the entire circumstances discussed below, I do not agree.

In support of the assertion that Moseley was not a satisfactory employee, Respondent introduced 15 exhibits (Respondent Exhibits 6 through 20) which consist of patient account records showing errors for which Moseley was purportedly responsible. However, it was conceded that eight of these documents, since they were in the nature of computerized running accounts, were not printed, and hence not available to Reynolds, until *after* Moseley had been terminated. Accordingly, and as Reynolds conceded, his decision to recommend Moseley's termination was not, and could not be, predicated upon consideration of whatever these documents purported to show. In short, these documents were not uncovered by Respondent until some point after Moseley's termination and undoubtedly were sought out in preparation for the proceeding herein. I therefore can but regard them

as of little probative value in assessing the motive for the termination. The records which fall into this category consist of Respondent Exhibit 9, 11, 12, 13, 14, 15, 16, 17, 18 and 19.

I turn now to the exhibits which reflect purported errors made by Moseley prior to her termination. Preliminarily, it is noted that Respondent's billing statements and related data are prepared and issued by means of a complicated system of code numbers which are first entered into a manually operated keypunch system and then fed into a computer. There are 7,000 such transactions fed to the keypunch daily. Although Moseley was responsible for initially determining the correct code numbers, her function did not include operation of the keypunch or of the computerized data processing system. According to Reynolds, there are a combination of digits which make up between 300 and 400 financial classification codes, alone. The first of the exhibits, *Respondent Exhibit 6*, is a patient billing statement which reflects, *inter alia*, an entry stating "Routine Employee Exam." According to Reynolds, this was an error and should have read "Address Correction." The error was caused because Moseley used the wrong code number and this was entered manually into the keypunch system, resulting in the entry stated.[11] The exhibits reflect that two such mistakes were made on April 18, 1975. There is no evidence that the recipients of the two statements made any complaint and it is obvious that

[11] The code used was 38-7363. It should have been 38-7393.

there was no monetary loss sustained by either Respondent or the hospital. *Respondent Exhibit 7* consists of four statements reflecting mistaken entries of employee discounts. These are statements of employee patients who are entitled to a discount, the payments being made by payroll deductions. As I interpret it, two of the documents reflect credit balances because of the payroll deduction entries instead of one. The other two reflect similar irregular credits or deductions, but they were corrected before being sent out. *Respondent Exhibit 8* is the billing statement of a nurse. As I interpret Reynolds' testimony, it appears that she was credited with a nurse's discount whereas, since she was married to a doctor, she was entitled to a doctor's discount, which was somewhat higher. In any event, the difference amounted to $5.10 and was credited to the nurse's account by the refund clerk 2 weeks later. Reynolds said the error had been called to Moseley's attention and should have been corrected by her 2 weeks earlier. Concerning this type of mistake, Reynolds on cross-examination conceded that "Others [employees] have made similar errors, yes." *Respondent Exhibit 10* is a statement to a doctor. After reflecting one insurance payment and two Blue Cross payments, the statement shows a current balance due of $4.91. The error consisted in a failure to give a physician's discount, which would have resulted in no balance being due. Additionally, Moseley rubberstamped the bill "Your insurance company paid its portion of this statement. The balance is your responsibility. Please remit." Reynolds testified that this stamp should not have been placed on the statement because it is the hospital's policy not to use this stamp on the statements of physicians.

Respondent Exhibit 20 requires a fuller discussion. This exhibit consists of records of bad debt accounts. Although Reynolds' testimony was not technically clear on the point, as best I understand it, the bad debt accounts should not reflect a debt balance or a credit balance. "They're written off," he said, "to bad debt in the account from an audit viewpoint as a zero balance." In any event, this exhibit reflects that in the month of March 1975, 80 such accounts incorrectly reflect a debt balance rather than a zero balance. Significantly, these errors came to Reynolds' attention on March 17, 1975, Moseley conceded that at this time Reynolds came to her and asked why "we would make such a large mistake." However, Moseley testified that she explained to Reynolds that she had followed the notes pertinent to the subject left by her predecessor, Rita Carpenter.[12] According to the unrefuted testimony of Moseley, Reynolds called Carpenter and Carpenter agreed that the notes were in error. In any event, Moseley was instructed as to the correct procedure and she proceeded to correct the errors. Moseley testified that in so doing, she came in on her own time and made the corrections in one day. Reynolds testified that *all* the corrections were not made

[12] Moseley was hired to replace Carpenter when Carpenter indicated that she was permanently retiring to have a child, Carpenter remained on the job to help train Moseley for a period of 5 weeks.

until about a month. Moseley testified, however, that after the mistake was uncovered and the problem solved, nothing further was said to her about the matter.[18]

I turn now to my conclusions. It is, of course, well settled that the Board may not substitute its judgment for that of any employer in determining whether an employee's work performance, or whatever other reason is, in the employer's view, a justifiable ground for termination. I should not attempt to do this here. Nevertheless, in determining whether Moseley was discharged because of her union activity, as the General Counsel contends, or whether she in fact was terminated because she failed to perform her job properly, as Respondent contends, an assessment of the evidence in support of the employer's claims must be made.

As has been discussed above, the fact that Moseley did make mistakes during her 3-month period of employment is not open to question. But this is hardly surprising. Considering the fact that as a new employee, her job required that she become familiar with 300-400 financial classification codes, the fact that 90 percent of the 7,000 account transactions are processed through the Business Department where Moseley worked, and the fact that there are various different types of forms and statements involved in the processing of the accounts, it would appear that cer-

[18] I shall have further comment below concerning any criticism or warnings given to Moseley during the period prior to her termination.

tain errors are bound to creep in. But I need not speculate on the matter, for even Reynolds admitted this to be true. In this connection, it is noteworthy that prior, during and after Moseley's period of employment, Respondent admittedly had an "ongoing" problem with the keypunch operation which submitted documents to data processing, that this was a factor which directly affected the efficiency of the work entailed in Moseley's job, and that it contributed to the likelihood of errors being made. Moreover, indicative of the complexity of the work involved, it is significant to note that after Moseley was terminated, the duties of her job were assigned to two employees. Although these employees also performed some other work, Reynolds testified that Moseley's work was divided between them because, ". . . it would have put too much responsibility upon one person, so we shifted it to someone else."

Although Reynolds testified that at times he cautioned Moseley to the effect that she was making "too many mistakes," he conceded that he did not give her any warning to the effect that she was not doing her work properly. Moseley testified that the only time that Reynolds expressed concern to her about mistakes were those committed in March as reflected in Respondent Exhibit 20. However, as previously related, Reynolds subsequently accepted her explanation that these occurred because of incorrect instructions left to her by her predecessor. On the entire record, I am persuaded and find that during her entire period of employment, Moseley was not subject to any more

criticism than might be expected of any new employee. In fact, it appears that just the opposite was true, for Moseley credibly testified that at one point prior to her termination, Reynolds introduced her to the keypunch operator as "the crackerjack new employee." [14]

I have previously set forth the memo which Reynolds prepared and placed in Moseley's personnel file on April 15. I find incredible Reynolds' assertion that the occasion for his taking this action on the very day following Moseley's being taken to task by three Respondent officials for allegedly violating an unlawful no-solicitation rule was just a matter of coincidence. Indeed, even a cursory reading of that memo impels the distinct impression that it was prepared as groundwork for future action.[15] This is particularly true when it is considered that the subject matter related to errors that had occurred in March and had for the most part long been corrected.[16] Moreover,

[14] Reynolds denied introducing her to the keypunch operator as a crackerjack employee and said that he could not recall describing her in such terms to any other supervisor. I do not believe that Moseley fabricated this testimony, and, as indicated above, I credit her on the point.

[15] Reynolds' memo of April 15 includes the setting forth of certain conversations which he allegedly held with Moseley during the period indicated. To the extent that Reynolds did not give sworn testimony concerning these individual conversations, which he largely did not, I do not accept as fact the accounts of these conversations as stated in the memo.

[16] Reynolds testified that it was not uncommon for Respondent to terminate unsatisfactory employees prior to the expiration of their probationary period. It might well be questioned why Respondent did not take similar action with

absent an outside reason, it seems peculiar that Reynolds would take the time to show the memo to his superior, as he conceded doing, prior to placing it in Moseley's file.

Apart from the other violations herein found, Respondent's union animus was clearly demonstrated when, upon learning of Moseley's union activities, it proceeded to summon her before three high echelon supervisors and warn her, without apparent provocation, to comply with its unlawful no-solicitation rule. This was in rather sharp contrast to its permitting Karen Hopkins, who was clearly opposed to the Union, to discuss the current union activity with her supervisor during working hours.

In sum, and for all the reasons above set forth, I find that Respondent discharged Moseley because of her activity in support of the Union and to discourage union activity among its employees. It thereby violated Section 8(a)(3) and, derivatively, Section 8(a)(1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operation of Respondent described in section I, above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states

respect to Moseley if in fact her performance were such as that characterized in Reynolds' memo.

and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain conduct in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action, as set forth below, designed to effectuate the policies of the Act.

It having been found that Respondent discharged Barbara Moseley in violation of Section 8(a)(3) of the Act, I shall recommend that Respondent be ordered to offer her full and immediate reinstatement to her former position, or if this position no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges and to make her whole for any loss of earnings she may have suffered from the date of her discharge to the date of Respondent's offer of reinstatement. Backpay shall be computed in accordance with the formula prescribed in *F.W. Woolworth Co.*, 90 NLRB 289, with interest thereon computed in the manner and amount prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

In view of the nature and extent of the unfair labor practices herein found, it will be recommended that Respondent be ordered to cease and desist from in any manner infringing upon the rights guaranteed employees in Section 7 of the Act.

Conclusions of Law

1. Baylor University Medical Center is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By engaging in the conduct described in section III, above, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On the basis of the above findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [17]

ORDER

Baylor University Medical Center, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Promulgating, maintaining in effect, enforcing, or applying any rule or regulation prohibiting

[17] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

employees from soliciting on behalf of any labor organization during their nonworking time in any area of its hospitals or on its outside premises other than immediate patient care areas.

(b) Engaging in surveillance of its employees' union meetings or activities.

(c) Discouraging membership in Laborers International Union of North America, Local Union No. 648, AFL-CIO; and North Central Texas Laborers' District Council, Laborers International Union of North America, AFL-CIO, or any other labor organization by discharging employees or otherwise discriminating in any manner in regard to their hire or tenure of employment or any term or condition of employment.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer Barbara Moseley immediate reinstatement to her former position, or if this position no longer exists, to a substantially equivalent position, and make her whole for any loss of pay she may have suffered by reason of the discrimination against her in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment rec-

ords, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Rescind its rules restricting the areas in which employees may solicit on behalf of a labor organization during the employees' nonworking time insofar as it applies to other than immediate patient care areas, and prohibiting distribution of union literature during employees' nonworking time in nonworking areas of its operations or on its outside premises.

(d) Post at its hospital facilities in Dallas, Texas, copies of the attached notice marked "Appendix."[18] Copies of said notice on forms to be provided by the Regional Director for Region 16, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Deci-

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[18] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

sion what steps Respondent has taken to comply herewith.

Dated, Washington, D. C.

/s/ John P. von Rohr
JOHN P. VON ROHR
Administrative Law Judge

FORM NLRB-4727 (9-69) JD-207-76

[SEAL] [SEAL]

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT promulgate, maintain or enforce any rule or regulation which prohibits our employees from soliciting on behalf of any labor organization on our hospital premises or grounds other than immediate patient care areas during employees' nonworking time, or from distributing other than in immediate patient care areas literature on behalf of any labor organization in nonwork areas of our hospital, or on our grounds during their nonworking time.

WE WILL NOT reprimand or warn employees for engaging in union activities.

WE WILL NOT engage in surveillance of our employees' union meetings or union activities.

WE WILL offer Barbara Moseley immediate and full reinstatement to her former position, or if this position no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges and make her whole for any loss of earnings she may have suffered by reason of her unlawful discharge.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

All our employees are free to become or remain or to refrain from becoming or remaining members of Laborers International Union of North America, Local Union No. 648, AFL-CIO; and North Central Texas Laborers' District Council, Laborers International Union of North America, AFL-CIO, or any other labor organization.

BAYLOR UNIVERSITY MEDICAL CENTER

Dated ———— By ————————
(Representative) (Title)

THIS IS AN OFFICAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remian posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Rm 8-A-24, 819 Taylor Street, Ft. Worth, TX 76102 (Tel. No. 817 334-2941)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 260957 59

No. 78-80

In The

Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

BAYLOR UNIVERSITY MEDICAL CENTER,

Respondent.

Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

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No. 78-80

In The

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OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

BAYLOR UNIVERSITY MEDICAL CENTER,
Respondent.

Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent, Baylor University Medical Center, respectively prays that the Petition For A Writ Of Certiorari to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 14, 1978, be denied.

OPINIONS BELOW

Petitioner correctly states the relevant opinions below. See Petition, Appendix A.

JURISDICTION

The jurisdictional requisites are set forth in the Petition (p. 2). This Court has jurisdiction under 28 U.S.C., §1255 (1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia was correct in finding that Respondent in this case presented evidence sufficient to show that application of Respondent's No-Solicitation and No-Distribution Rule to corridors and to Respondent's cafeteria and vending areas was necessary and proper to avoid disruption of health care operations and disturbance of patients.

STATUTE INVOLVED

The Petition correctly states and quotes the statute involved in this case.

STATEMENT

While Petitioner's statement of the case is generally accurate, it does omit certain significant points which Respondent believes should be before the Court in making its decision. The first among these points is the extent and nature of the evidence in this case. The portion of the case concerning Respondent's No-Solicitation and No-Distribution Rule and the reasonableness and necessity therefore consumed approximately two and one-half days. Respondent submitted testimony by ten witnesses, including hospital administrators, physicians and the clergy, such testimony filling several volumes. Respondent further submitted voluminous documentary exhibits of various kinds explaining the hospital,

its function and the special circumstances necessitating application of the Rule to those areas of the hospital frequented by patients and visitors. This is to be contrasted with other cases involving similar issues concerning no-solicitation and no-distribution rules such as *Beth Israel Hospital vs. National Labor Relations Board,* ..... U.S. ....., 98 S.Ct. 2463 (1978); and *St. John's Hospital and School of Nursing, Inc.,* 222 NLRB 1150 (1977), enf. den. 557 F. 2d 1368 (10th Cir. 1977) in which the evidence consisted of little more than limited stipulations of fact and in which evidence as to special circumstances was never really presented.

The evidence establishing the following was undisputed and uncontradicted. This evidence established that Respondent is the seventh largest hospital of the more than five thousand "acute care" private and charitable hospitals in the United States. Each year Respondent handles over 44,000 inpatients, 70,000 outpatients and 37,000 emergency patients. The hospital employs over 3,700 employees and has 750 physicians on its staff and 110 house staff members such as interns and residents. Each day up to 20,000 persons enter the hospital whether as visitors or patients. As described by one witness, the corridors are as crowded as the main streets of downtown Dallas.

Petitioner also failed to mention the extensive evidence presented by Respondent (which is unquestioned in the record) concerning Respondent's corridors, related waiting areas, cafeteria and vending areas. For example, as to the corridors and related waiting areas, the evidence showed that quick and unimpeded passage was *imperative* to the efficient operation of the hospital and that the hallways serve not only as passageways for patients,

visitors, doctors and equipment but also as viewing rooms for the nursery and storage areas for a variety of hospital emergency equipment. The testimony and other evidence also showed that the corridors were used extensively and directly for physical therapy purposes and transportation of patients to and from treatment. The evidence also showed that at times rapid and unimpeded movement in the corridors and hallways is a matter of life and death.

The evidence regarding the cafeteria and vending areas is equally unquestioned. At least forty percent (40%) of the customers in the cafeteria and vending areas are patients or visitors in the hospital. (Compare with the 9% visitor and 1.56% patient for Beth Israel). The physical arrangement of the cafeteria necessitates a mingling of employees, doctors, patients and visitors. The testimony, such as that of the hospital chaplain, also shows that patients and visitors are often consoled and counseled in the cafeteria. This is especially true as to visitors who are under stress and are frequently ministered to by members of the clergy in the cafeteria.

It is most important to understand that the foregoing descriptions constitute only a highlight of the voluminous evidence presented by the Respondent in this case.

These were the undisputed facts faced by the Court of Appeals on Respondent's Petition for Review. The Court of Appeals properly discharged its judicial function by reviewing the case on the evidence holding that the decision in *St. John's* did not establish any iron-clad rules and that each case must be considered on its own merits and particular facts.

REASONS FOR DENYING THE WRIT

The Petitioner bases its Petition on the assertion that the decision of the Court of Appeals is generally in conflict with this Court's decision in *Beth Israel Hospital v N.L.R.B.*, supra, and that the Court of Appeals supposedly erred in rejecting and refusing to apply the Petitioner's decision in *St. John's Hospital and School of Nursing Inc.*, supra. Petitioner also asserts that the Court of Appeals erred in applying a general restaurant and shop standard to Respondent's cafeteria and vending areas. The relief sought is a remand, not merely to the Court of Appeals but to Petitioner itself. As demonstrated below, the reasons asserted by Petitioner for its application for a Writ of Certiorari are without substance or validity.

Responden. submits that even the most cursory comparison of the decision of the Court of Appeals in this case with this Court's decision in the *Beth Israel* case demonstrates that the two do not conflict as to treatment of Petitioner's decision in *St. John's Hosital and School of Nursing Inc.*, supra. When considering this case, the Court of Appeals was presented by the Petitioner with the proposition that what we may call the "St. John's Rule" should be applied as a rigid and unyielding rule of law, applicable in all cases involving hospital no-solicitation and no-distribution rules. The Court of Appeals rejected this position in favor of a case by case consideration of the evidence, with the basic test being whether the hospital could demonstrate the unique circumstances necessary to justify the no-solicitation and no-distribution restrictions involved.

The action of the Court of Appeals in considering this case on its own merits and on the evidence presented is clearly in line with

the basic rules and principles laid down by this Court in *Beth Israel.* That general rule was stated as follows:

> "We therefore hold that the Board's general approach of requiring health-care facilities to permit employee solicitation and distribution during non working time in non-working areas, *where the facility has not justified the prohibitions* as necessary to avoid disruption of health care operations or disturbance of patients, is consistent with the Act." (Emphasis added) 98 S.Ct. at 2477.

The Court of Appeals in the instant case considered the evidence and found that there was not substantial evidence to support the Board's decision and Respondent had in fact presented uncontradicted and undisputed evidence justifying its No-Solicitation and No-Distribution Rule and that, in light of Respondent's showing, enforcement of the Board's Order was to be denied. Certainly this is within the decision in *Beth Israel.*

Overlapping the more general findings and points discussed above but nevertheless standing as a separate issue in this case is the Court of Appeals treatment of the Respondent's cafeteria and vending areas. Petitioner asserts and Respondent does not deny that the decision of the Court of Appeals which applied a commerical restaurant standard to the issue of Respondent's cafeteria and vending machine areas is in conflict with this Court's decision in *Beth Israel.* However, Respondent submits that whatever error may exist in that conflict it is not sufficient to justify granting the Petition for Writ in this case or in any way overturning the decision of the Court of Civil Appeals.

In considering the issue of the cafeteria and vending areas the Court of Civil Appeals certainly relied primarily on the general restaurant rules. However, the Court also recognized that:

> "Of course, there is not as much medical importance in maintaining the quietness or non-congestion of areas ordinarily removed from direct patient care as a public cafeteria or vending area, *but such areas in a hospital are not totally devoid of medical significance.*" (Emphasis added.)

While the Court of Appeals did not state that it relied directly on this particular standard, it is clear that the Court did recognize the application of the general rule later established in *Beth Israel* that just as with other areas of the hospital, a no-solicitation rule may be applied to cafeterias and vending areas where there is a proper evidentiary showing of justification. The evidence is clear in this case that such a showing was made. For example, as already noted, the undisputed evidence shows that at least 40% of Respondent's cafeteria customers are patients or visitors. As this Court itself noted, it was significant that in the *Beth Israel* case the evidence demonstrated that only 9% of the cafeteria's patrons were visitors and 1.56% were patients. The undisputed evidence in the instant case also establishes that there are no separate areas in the cafeteria for employees and that there is a necessary mingling of employees, patients and visitors. Perhaps most important is the undisputed testimony from professionals in the record in this case that the medical and psychological problems which exist among visitors and patients in the hospital cafeteria not only justify but necessitate application of the no-solicitation rule there. What the Court of Appeals rejected was the Petitioner's position that a no-solicitation rule is never justified in such areas.

A key factor in any case involving application of a no-solicitation rule to areas such as cafeterias is a question of whether employees have some place else to gather and carry on their union or other activities. This is an essential feature in balancing the interests of all involved, including the hospital, employees, patients

and visitors. Just as with the other factors discussed, the evidence presented by Respondent places this case in an entirely different position than the case faced by this Court in *Beth Israel Hospital v. NLRB,* supra. A comparison of the *Beth Israel* situation is best seen in a comparison of two quotations. The first is a finding from the decision of the National Labor Relations Board in *Beth Israel* which was quoted by this Court in its decision as follows:

> "[T]here are relatively few places where employees can congregate or meet on hospital grounds or in the nearby vicinity for the purpose of discussing non-work related matters other than in the cafeteria; secondly, the area in the neighborhood of the hospital is congested and provides no ready access to employees...." (98 S. Ct. at 2468).

This is to be compared with the undisputed evidence presented by Respondent in this case which is best summarized by the Court of Appeals as follows:

> "As regards the situation at Baylor, however, Petitioner has testified that its rule does not apply to any area outside the hospital building, and it is apparent that the hospital's parking lots, lawns and gardens supply an excellent forum for solicitation. These areas are heavily used by employees, many of whom eat their meals and take their breaks there. Thus despite the paucity of indoor areas available for solicitation, it is by no means the case — particularly in light of the mild climate in Dallas, which makes the outside areas available virtually all year — that the process of labor organizing would be crucially disadvantaged by limiting solicitation for the most part, to the out of doors." (Slip opinion p. 18)

Respondent submits that clearly there is no need to remand this case to the Court of Appeals or to the Board for consideration of evidence which is undisputed and clear in the record and which on its face meets the standards set by this Court.

Ultimately, it must be noted that what is in issue here is the question of enforcement or denial of enforcement of an order of the NLRB. The function of any Court of Appeals and of this Court in reviewing such an order is to determine whether there is substantial evidence to support the decision and order and in this case the Court of Appeals ruled emphatically that there was not substantial evidence. The Court of Appeals reviewed all of the evidence in this case and its finding *based on that evidence* are best stated by the Court itself as follows:

> "We find that the record evidence *compels* the conclusion in Baylor [Respondent herein] involves unique circumstances which justify a broad proscription on solicitation and distribution." (Pet. for Writ, App. 5a-6a) (Emphasis added)

And again in its conclusion, the Court of Appeals states:

> "In this case we feel that petitioner [Respondent herein] has adequately demonstrated that the well-being of patients and visitors and the operation of the hospital would be jeopardized by allowing solicitation in the corridors and wherever else patients or visitors have access." (Pet. for Writ, App. 24a)

Clearly, the Court of Appeals in this case made the ultimate determination that the Petitioner's decision and order was not supported by substantial evidence and that Respondent in this case did produce sufficient evidence to sustain its no-solicitation rule. In this regard, it must again be emphasized that the Petition for a Writ of Certiorari before this Court does not dispute or question a single evidentiary or fact point relied upon by the Court of Appeals. Thus, while the magic language might not have been used, the acid test of substantial evidence was the determining factor.

Finally, Respondent submits that Petitioner's request that the case be remanded directly to it is irrational in light of the earlier

proceedings of this case. The Petition for a Writ clearly indicates that if the case is remanded Petitioner would do nothing more than apply to the facts of this case the standards that it set in *St. John's Hospital and School of Nursing Inc.*, supra. This is exactly what both the Administrative Law Judge and the Petitioner itself did during their earlier opportunities to consider this case. Respondent must point out that such a remand would be an exercise in futility since Petitioner clearly would do nothing more than it has done before and that there can be nothing new for Petitioner to add to this case for consideration by the Court of Appeals or by this Court. The Court of Appeals reviewed the record and stated the facts — facts not disputed by Petitioner. Thus nothing remains to be done and nothing useful can be done by Petitioner. Petitioner seeks a Writ of Certiorari on the premise that the Court of Appeals supposedly applied the wrong rule of law to the undisputed facts. Respondent submits that the Court of Appeals in truth did nothing but deny enforcement of an NLRB order based on the substantial evidence standard, but if error there was it was one of law and for this Court or the Court of Appeals to correct and not for Petitioner.

CONCLUSION

This Court's decision in *Beth Israel Hospital v. N.L.R.B.*, supra, recognized the application of the basic rule that a hospital-employer may justify application of a no-solicitation and no-distribution rule in areas such as corridors, cafeterias, and vending areas and similar areas by making an evidentiary showing that the prohibitions are justified to avoid disruption of health care operations or disturbance of patients. Respondent presented such evidence, such evidence is clear in the record of this case, and

such evidence is undisputed and unquestioned. Respondent submits that it is most significant that in its Petition for a Writ of Certiorari, Petitioner does not dispute or question the existence of the evidence or the evidentiary findings made by the Court of Appeals. The Court of Appeals tested the Petitioner's order against the evidence and reached its decision "with due regard for 'the importance of the employer's interest in protecting patients from disturbance'." (Pet. p. 8)

In light of these circumstances the decision of the Court of Appeals is correct in denying enforcement of the Board's order and the ends of justice would not be served by the granting of this Writ or the remanding of this case for any purposes.

WHEREFORE, PREMISES CONSIDERED, Respondent BAYLOR UNIVERSITY MEDICAL CENTER, respectfully prays that this Court deny the Petition for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of August, 1978, true and correct copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari were served on the below listed persons by deposit in the United States Mail, certified, with sufficient postage thereon for delivery:

Wade H. McCree, Jr. Solicitor General of the United States Department of Justice, Washington, D.C. 20530

Mr. John S. Irving, General Counsel, National Labor Relations Board, Washington, D.C. 20570

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